

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:DEM:WAS:TL-N-1652-00
KEChandler

date: April 26, 2000

to: Steven D. Hansen, Acting Case Manager, Examination Group 1106

from: Associate District Counsel, Delaware-Maryland District,
Washington, D.C.

subject: [REDACTED] - Qualified Form 870

This is in response to your request for advice regarding preparation of qualified Form 870s. In large part, your request seeks confirmation of written and oral advice you previously received from Tom Jenkins, a Joint Committee reviewer in the IRS office in Indianapolis, Indiana (see Exhibit A). The examinations of the domestic and foreign entities considered in the qualified Form 870s issue have been completed and Examination is currently working to close out the examinations and forward the unagreed issues to Appeals for its consideration. The only outstanding matter delaying closing is the qualified Form 870s issue.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUES

1. Can qualified Form 870s be used in the context of related, but distinct, entities?
2. If qualified Form 870s can be used, what is the minimum amount of any expedited refund?
3. If qualified Form 870s can be used, what qualifying language should be inserted in the Form 870s?
4. Should an unqualified Form 870 be obtained for the net deficiency of \$[REDACTED]? If so, from which entity or entities should the unqualified Form 870 be obtained?

FACTS

The Examination team has concluded the examination of the following related domestic entities:

<u>Entity</u>	<u>Years Examined</u>
[REDACTED]	[REDACTED] through [REDACTED]
[REDACTED]	[REDACTED] through [REDACTED]
[REDACTED]	[REDACTED] and [REDACTED]

The Examination team also has concluded the examination of the following related foreign entities:

<u>Entity</u>	<u>Years Examined</u>
[REDACTED]	[REDACTED] though [REDACTED]
[REDACTED]	[REDACTED] through [REDACTED]
[REDACTED]	[REDACTED]

[REDACTED] merged into [REDACTED] in [REDACTED] to form a new corporation, [REDACTED]. The attached schedule (Exhibit B) reflects the net deficiencies/overpayments of each discrete domestic and foreign entity.

As the schedule reflects, the related examinations result in net agreed deficiencies for [REDACTED], and the three foreign sales corporations in the amount of \$ [REDACTED]. The related examinations of [REDACTED] and [REDACTED] result in net agreed overpayments of \$ [REDACTED]. Neither the net agreed deficiencies or overpayments reflect adjustments for outstanding unagreed issues to be forwarded to Appeals for its consideration. Netting the agreed deficiencies and overpayments for all domestic and foreign entities results in a net deficiency of \$ [REDACTED]. However, this net deficiency does not reflect a [REDACTED] deposit in the amount of \$ [REDACTED] designated for [REDACTED]. That deposit is not reflected in any computations on the attached schedule.

[REDACTED] does not want to agree to assessment of \$ [REDACTED] of deficiencies before overpayments of \$ [REDACTED] are cleared by the Joint Committee. Even if all unagreed issues are determined against the taxpayers, given the \$ [REDACTED] deposit, a net refund will be due [REDACTED] absent consideration of any restricted interest due. The potential refund is computed as follows:

[REDACTED] deposit	\$ [REDACTED]
Agreed net deficiency on schedule	([REDACTED])
Unagreed [REDACTED] adjustment	([REDACTED])
Potential refund	\$ [REDACTED]

The [REDACTED] unagreed issues which could result in a tax liability of \$ [REDACTED] is not reflected in the above computation. This omission is consistent with the position, discussed below, that the minimum amount of the refund reflects this amount. If the [REDACTED] unagreed issues are resolved in the taxpayer's favor, an additional refund of \$ [REDACTED] will be made.

Tom Jenkins, Joint Committee Reviewer, advised the Examination team that in concluding the examination of [REDACTED], [REDACTED] and [REDACTED], and their corresponding foreign sales corporations, the tax liability/overpayment for each discrete entity had to be computed to determine if the net result for each entity resulted in a Joint Committee case. Following this advice, the Examination team has concluded that the [REDACTED] and [REDACTED] examinations result in refunds subject to Joint Committee review.

In contrast to the discrete entity approach for determining if the result is subject to Joint Committee review, Mr. Jenkins advised the Examination team that for purposes of applying the qualified Form 870 expedited refund procedures all deficiencies/refunds should be considered together. Mr. Jenkins indicated this position had been "cleared" with Mr. Norman Brand of the Joint Committee who opined that global consideration was appropriate as any check covering any final entity would be written by [REDACTED].

For purposes of any expedited refund, Mr. Jenkins also advised the examination team that the [REDACTED] minimum refund must reflect the unagreed issues resulting in a potential expedited refund of \$ [REDACTED] rather than the agreed overpayment of \$ [REDACTED].

At the time Mr. Jenkins provided advice to the Examination team, final computations had not been completed and he did not know a net deficiency situation exists. Consequently, he provided no guidance regarding the need to obtain an unqualified Form 870 for the net deficiency.

DISCUSSION

Issue 1. Can Qualified Form 870s be used in the context of related, but distinct, entities?

Section 6405 addressing reports of refunds and credits provides, in part:

(a) By Treasury to Joint Committee. - No refund or credit of any income...tax ... in excess of \$1,000,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Secretary, is submitted to the Joint Committee.

IRM [4.3.5] 1.4 concerning determining the jurisdictional amount for a Joint Committee case provides, in part:

2. The amounts proposed for allowance to each separate taxpayer provide the basis for determining whether the case requires a report. Overpayments proposed in other related cases do not enter into the computation. A deficiency against one

taxpayer is not offset against an overpayment of another taxpayer, even though the changes resulted from the allocation of income or deductions from one taxpayer to another.

IRM [4.3.5] 1.4.2 clarifies consideration of multiple years as follows:

1. Concerning the same taxpayer and the same examination, a deficiency for one taxable year is to be offset against an overpayment for another taxable year for the same type of tax. However, if a determined overpayment in one tax results in a deficiency in any other tax for the same taxpayer, the deficiency should not be applied as an offset in determining the jurisdictional amount.

A merged corporation's deficiency for a tax year before the merger may not offset an overpayment of its merger partner for a premerger tax year to determine whether a refund report must be made to the Joint Committee on Taxation. Rev. Rul. 81-77, 1981-1 C.B. 582. Consequently, as you have already concluded, the net deficiencies and overpayments of [REDACTED], [REDACTED] and [REDACTED] and their related foreign sales corporations cannot be aggregated for purposes of determining whether there is a credit or refund that must be reported to the Joint Committee on Taxation.

In contrast to the reporting requirements, there is no prohibition to considering all of the related entities in drafting qualifying language to be included in the Form 870s.

Section 6402(a), Authority to Make Credits or Refunds, provides:

General rule. - In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e) refund any balance to such person.

See also, Treas. Reg. §301.6402-1.

The Service may not credit the refund of one taxpayer to another taxpayer unless the Anti-Assignment Act was followed. See

31 U.S.C. sec. 3727. However, the Anti-Assignment Act does not apply to a transfer resulting from a statutory merger or consolidation of two corporations. See Rev. Rul. 56-3, 1965-1 C.B. 685. Thus, based on the facts provided the Anti-Assignment Act is not implicated.

The qualified Form 870s you anticipate obtaining may constitute the requisite written authorization for crediting overpayments to deficiencies of related taxpayers. Additionally, you have advised us that [REDACTED] intends to provide explicit written authorization for the crediting between the related taxpayers.

Since the anticipated expedited refunds can and will be used to offset the deficiencies of related tax entities, qualified Form 870s can be used in the context of the related, but distinct, entities currently under examination.

Issue 2. What is the minimum amount of any expedited refund to [REDACTED]?

IRM [4.3.5] 6.2 concerning reports to the Joint Committee on cases involving unagreed issues provides, in part:

- (1) The Joint Committee will accept a report for review with one or more unagreed issues, if the following conditions are met:
 - a. The unagreed issues will require a substantial period of time to resolve (six months or more), and the delay would deprive the taxpayer of a timely refund to which the taxpayer is clearly entitled, in spite of the resolution of the unagreed issues; and
 - b. The refunds reported reflect the minimum amount to which the taxpayer is entitled, regardless of the outcome of the unagreed issues.

* * * * *

- (3) A supplemental report will be submitted to the Joint Committee when the unagreed issues are finally resolved, even if the resolution of such issues does not cause an additional refund or credit.

You have been advised by Tom Jenkins that the minimum refund [REDACTED] can receive at this time is computed as follows:

Refund Attributable to	
Agreed Issues	\$ [REDACTED]
Potential Adjustment Attributable	
to Unagreed Issues	[REDACTED]
Minimum Refund	\$ [REDACTED]

You are concerned that Mr. Jenkins' advice appears to directly contradict the manual instruction that "refunds reflect the minimum amount to which the taxpayer is entitled, regardless of the outcome of unagreed issues." However, Mr. Jenkins advice, and the manual provision, also anticipate a supplemental report to the Joint Committee when the unagreed issues are resolved and result in an additional refund. As almost \$ [REDACTED] of the potential refund to [REDACTED] remains in dispute, we concur with Mr. Jenkins advice that the minimum refund amount is \$ [REDACTED].

Issue 3. What qualifying language should be inserted in the Form 870s?

IRM [4.3.5] 3.2.6 addresses obtaining a Form 870 when there is no net deficiency as follows:

1. At the taxpayer's option in cases where there is no net deficiency, agreement may be signified by filing:
 - A. A qualified Form 870, Waiver of Restrictions on Assessment and collection of Deficiency in Tax and Acceptance of Overassessment, or equivalent by inserting on it

"This Waiver of restrictions on assessment and collection is to take effect as a waiver of restrictions on the earlier of the date that expires 30 days after receipt by the Joint Committee on Taxation of a request for expeditious processing of any refunds due if, during the 30-day period, the Joint Committee on Taxation Staff does not object in writing to the expeditious processing of such refunds or the date the Joint Committee on Taxation completes its review of the report submitted

under section 6405 of the Code without objection to the proposed refunds or credits submitted for review"; ...

Given that the inter-related taxpayers and offsetting refunds and deficiencies, the above recommended language to include on the qualified Form 870s will have to be revised slightly. For example, the following may be used on the qualified Form 870 to be obtained from [REDACTED]:

"This Waiver of restrictions on assessment and collection is to take effect as a waiver of restrictions on the earlier of the date that expires 30 days after receipt by the Joint Committee on Taxation of a request for expeditious processing of any refunds due [REDACTED] for the years [REDACTED] and/or [REDACTED] if, during the 30-day period, the Joint Committee on Taxation Staff does not object in writing to the expeditious processing of such refunds or the date the Joint Committee on Taxation completes its review of the report submitted under section 6405 of the Code without objection to the proposed refunds or credits submitted for review"; ...

Similar revisions to the language included on the 870s of the other related taxpayers will be necessary.

Issue 4. Should an unqualified Form 870 be obtained for the net deficiency of \$4,565,038? If so, from which entity or entities should it be obtained?

IRM [4.3.5] 3.2.7 addresses obtaining a Form 870 when there is a net deficiency as follows:

1. At the taxpayer's option in net deficiency cases, agreement may be signified by filing:
 - A. An unqualified Form 870 or equivalent showing the amount by which the deficiency exceeds the overpayment, accompanied by a qualified Form 870 or equivalent for the amount of the deficiency equal to the overpayment available for credit; ...

Based on the above quoted manual directive, an unqualified Form 870 should be obtained for the net deficiency. Since a deposit of approximately \$ [REDACTED] exists for [REDACTED] Corporation, we recommend that the following waivers be obtained from that entity:

An unqualified Form 870 in the amount of \$ [REDACTED]

A qualified Form 870 in the amount of \$ [REDACTED]

CONCLUSIONS

1. Qualified Form 870s can be used in the context of related, but distinct, entities. Additionally, we recommend that you obtain the explicit written authorization for the crediting between the related taxpayers [REDACTED] has advised you it would provide.
2. The minimum amount of any expedited refund to [REDACTED] is \$43,801,377.00.
3. The qualifying language set forth in the manual, with the modifications discussed above, should be used in any qualified Form 870.
4. An unqualified Form 870 should be obtained from [REDACTED] for the net deficiency of \$ [REDACTED].

This advisory has been reviewed by the National Office and their views incorporated herein. If you have any question regarding this memorandum or want to discuss this issue further, please contact Karen E. Chandler directly at (202) 634-5403, ext. 224.


BETTIE N. RICCA
Associate District Counsel

Attachments